



SMALL BUSINESS ADMINISTRATION

13 CFR Parts 128 and 134

RIN 3245-AH69

Veteran-Owned Small Business and Service-Disabled, Veteran-Owned Small Business — Certification; Correction

AGENCY: U.S. Small Business Administration.

ACTION: Correcting amendments.

SUMMARY: The U.S. Small Business Administration (SBA) is correcting a final rule that was published in the Federal Register on November 29, 2022. The rule implemented a statutory requirement to certify Veteran-Owned Small Business Concerns and Service-Disabled Veteran-Owned Small Business Concerns participating in the Veteran-Owned Small Business Federal Contracting Program. This document is making a correction to the final regulations.

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: On November 29, 2022, SBA amended its regulations to establish a certification program for Veteran-Owned Small Businesses (VOSB) and Service-Disabled Veteran-Owned Small Businesses (SDVOSB) to implement section 862 of the National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283, 128 Stat. 3292 (January 1, 2021). 87 FR 73400. This document is making the following corrections to the final regulations:

In the final rule at § 128.102, SBA incorrectly defined “Applicant” and “Service-disabled veteran.” The definition of “Applicant” is revised to reference Veteran Small Business

Certification Program (VetCert) instead of the SBA's self-certification program and removes "or a valid disability determination from the Department of Defense" as proof of service-disabled veteran status from the definition of "Service-disabled veteran." By law, SBA is required to verify the status of a veteran or service-disabled veteran with the Department of Veteran Affairs and cannot accept documentation from the Department of Defense as evidence of service-disabled veteran status.

The final rule at § 128.302(c) establishes that SBA may request additional documentation at any time during the eligibility determination process and that an applicant's failure to respond is grounds for denial. If SBA requests additional documentation which the applicant fails to submit in a timely manner or the information is incomplete, that applicant has not met its burden of proof. SBA inadvertently omitted the process by which SBA may deny certification. In such cases, SBA may make an adverse inference that missing information would result in a finding of ineligibility and may deny certification. While adverse inference is currently used by VetCert and SBA's other contracting certification programs, the final rule failed to adequately describe the process in § 128.302(c).

SBA amends § 128.401(a) to clarify that a firm must be certified at the time of offer on a VOSB or SDVOSB contract. SBA also corrects internal citations in the joint venture regulations at § 128.402 including paragraph (c)(7); paragraph (e)(2)(i)(B); paragraph (i)(2); and paragraph (j)(1), (2), and (3). SBA also revises § 128.402(d)(2) to correct a formatting issue with the word "protégé."

The final rule also amended part 134, subpart J, so that all VOSB and SDVOSB status protests are heard by SBA's Office of Hearing and Appeals (OHA). This correction makes several revisions to subpart J. First, § 134.1005(a)(2) failed to include a sentence which addresses specificity requirements that is included in other SBA contracting programs and previously used by SBA's SDVOSB self-certification program in part 125. This rule adds back that omitted sentence to § 134.1005(a)(2). Second, the final rule inadvertently retained language

from previous versions of § 134.1007(j)(1) and (2). SBA corrects § 134.1007(j)(1) to remove references to the outdated process for VOSB and SDVOSB status protests. SBA also amends the effects of a decision in §134.1007(j)(2) because the final rule included the previous approach used for OHA appeals of VA contracts. This approach is contrary to SBA's other contracting programs and inconsistent with SBA's intent for VetCert status protest. Accordingly, § 134.1007(j)(2) is amended so that, when an ineligible firm has been awarded a contract, the agency shall terminate the contract unless the contracting officer has made a written determination that termination is not in the best interests of the Government.

List of Subjects

13 CFR Part 128

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance, Veterans.

13 CFR Part 134

Administrative practice and procedure.

Accordingly, 13 CFR parts 128 and 134 are corrected by making the following correcting amendments:

PART 128 – VETERAN SMALL BUSINESS CERTIFICATION PROGRAM

1. The authority citation for part 128 continues to read as follows:

Authority: 15 U.S.C. 632(q), 634(b)(6), 644, 645, 657f, 657f-1.

2. Amend § 128.102 by revising the definitions of “Applicant” and “Service-disabled veteran” to read as follows:

§ 128.102 What definitions are important in the Veteran Small Business Certification Program?

Applicant means a firm applying for certification in the Veteran Small Business Certification Program.

Service-disabled veteran means a veteran who is registered in the Beneficiary Identification and Records Locator Subsystem or successor system, maintained by Department of Veterans Affairs' Veterans Benefits Administration as a service-disabled veteran.

3. Amend § 128.302 by adding a sentence to the end of paragraph (c) to read as follows:

§ 128.302 How does SBA process applications for certification?

(c) *** If an Applicant does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may draw an adverse inference and presume that the information that the Applicant failed to provide would demonstrate ineligibility and deny certification on this basis.

4. Amend § 128.401 by revising paragraph (a) to read as follows:

§ 128.401 What requirements must a VOSB or SDVOSB meet to submit an offer on a contract?

(a) *Certification requirement.* Only certified VOSBs and SDVOSBs are eligible to submit an offer on a specific VOSB or SDVOSB requirement. The concern must qualify as a small business concern under the size standard corresponding to the NAICS code assigned to the contract and be a certified VOSB or SDVOSB at the time of initial offer or response which includes price. Any small business concern that submits a complete certification application with to SBA on or before December 31, 2023, shall be eligible to self-certify for SDVOSB sole source or set-aside contracts (other than VA contracts) until SBA declines or approves the concern's application. Any small business concern that does not submit to SBA a complete SDVOSB certification application to SBA on or before December 31, 2023, will no longer be eligible to self-certify for SDVOSB sole source or set-aside contracts effective January 1, 2024.

5. Amend § 128.402 by revising the first sentence of paragraph (c)(7), the introductory text of paragraph (d)(2), and paragraphs (e)(2)(i)(B), (i)(2), and (j)(1) through (3) to read as follows:

§ 128.402 When may a joint venture submit an offer on a VOSB or SDVOSB contract?

(c) ***

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the certified VOSB or SDVOSB partner(s) to the joint venture will meet the limitations on subcontracting requirements set forth in paragraph (d) of this section, where practical. ***

(d) ***

(2) The certified VOSB or SDVOSB partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture, except that in the context of a joint venture between a protégé VOSB or SDVOSB and its SBA-approved mentor the VOSB or SDVOSB protégé must individually perform at least 40% of the work performed by the joint venture.

(e) ***

(2) ***

(i) ***

(B) The parties will perform the contract in compliance with the joint venture agreement and with the limitations on subcontracting requirements set forth in paragraph (d) of this section.

(i) ***

(2) At the completion of every VOSB or SDVOSB contract awarded to a joint venture, the certified VOSB or SDVOSB partner to the joint venture must submit a report to the relevant contracting officer and to SBA, signed by an authorized official of each partner to the joint venture, explaining how and certifying that the performance of work requirements were met for the contract, and further certifying that the contract was performed in accordance with the provisions of the joint venture agreement that are required under paragraph (c) of this section.

(j) ***

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or limitations on subcontracting requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (h) of this section.

PART 134 — RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

6. The authority citation for part 134 is revised to read as follows:

Authority: 5 U.S.C. 504; 15 U.S.C. 632, 634(b)(6), 634(i), 637(a), 648(l), 656(i), 657t and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart J issued under 15 U.S.C. 657f.

Subpart K issued under 15 U.S.C. 657f.

Subpart L issued under 15 U.S.C. 636(a)(36); Pub. L. 116–136, 134 Stat. 281; Pub. L. 116–139, 134 Stat. 620; Pub. L. 116–142, 134 Stat. 641; and Pub. L. 116–147, 134 Stat. 660.

Subpart M issued under 15 U.S.C. 657a; Pub. L. 117–81, 135 Stat. 1541.

7. Amend § 134.1005 in paragraph (a)(2) by removing the semicolon and adding a period in its place and by adding a sentence at the end to read as follows:

§ 134.1005 Contents of the VOSB or SDVOSB status protest.

(a) ***

(2) *** A protest merely asserting that the protested concern is not an eligible VOSB or SDVOSB, without setting forth specific facts or allegations, is insufficient;

8. Amend § 134.1007 by revising paragraphs (j)(1) and (2) to read as follows:

§ 134.1007 Processing a VOSB or SDVOSB status protest.

(j) ***

(1) A contracting officer may award a contract to a protested concern after the Judge has determined either that the protested concern is eligible for inclusion in SBA's certification database or has dismissed all protests against it.

(2) A contracting officer shall not award a contract to a protested concern that the Judge has determined is not an eligible VOSB or SDVOSB. If the contract has already been awarded, the contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders.

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